

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

TALISMAN CAPITAL TALON FUND, LTD., } 3:05-cv-354-BES-RAM
Plaintiff, }
v. } FINDINGS OF FACT AND
RUDOLF W. GUNNERMAN and SULPHCO, } CONCLUSIONS OF LAW
INC., }
Defendants. }

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This action arises out of a dispute over the ownership and transfer of certain intellectual property rights that deal with the removal of sulfur from crude oils (hereinafter referred to as the "SulphCo IP"). Plaintiff Talisman Capital Talon Fund, Ltd. ("Talisman") alleges that its predecessor-in-interest, Capital Strategies Fund, Ltd. ("Capital Strategies"), acquired the SulphCo IP rights from Defendant Rudolf W. Gunnerman ("Gunnerman") pursuant to a Technology Transfer and Assignment Agreement ("Transfer Agreement") executed on April 23, 2003 and subsequently amended. Talisman alleges that Gunnerman has breached the Transfer Agreement by continuing to exercise ownership, custody and control over the Sulphco IP rights that Talisman believes were transferred to Capital Strategies. Talisman also alleges that the SulphCo IP rights are being wrongfully used by Defendant SulphCo, Inc. ("SulphCo"), a company previously known as GRD, Inc.

Plaintiff filed this action on June 9, 2005 seeking declaratory relief as to the ownership of the Sulphco IP, as well as damages for breach of contract, bad faith breach of contract, breach of the implied duty of good faith fair dealing, tortious interference with contract, conversion, and unjust enrichment/constructive trust. Plaintiff's claims of bad faith breach of

1 contract and unjust enrichment against Gunnerman were dismissed on summary judgment in
 2 an Order (#156) dated September 28, 2007. A non-jury trial on Plaintiff's remaining claims
 3 commenced before the Court on December 1, 2008 and closing arguments were presented
 4 on March 3, 2009. The parties submitted separate Proposed Findings of Fact and
 5 Conclusions of Law and Post Trial Briefs. Having considered the testimony and evidence
 6 presented at trial, the briefs of counsel, and for the reasons set forth below, the Court now
 7 enters the following Findings of Fact and Conclusions of Law in accordance with its
 8 obligations under the Federal Rules of Civil Procedure. See Fed. R. Civ. Proc. 52(a)
 9 (requiring separate entry of findings of fact and conclusions of law following a bench trial).¹

10 I. FINDINGS OF FACT

- 11 1. Talisman is a corporation incorporated in the British Virgin Islands with its registered
 12 office in Tortola, British Virgin Islands.
- 13 2. SulphCo is a Nevada corporation with its principal place of business in Houston,
 14 Texas. SulphCo was previously known as GRD, Inc. ("GRD"), a closely-held Nevada
 15 corporation formed by Gunnerman in 1999 to pursue technologies related to the
 16 removal of sulfur from crude oil and petroleum distillates.
- 17 3. Gunnerman is a resident of the State of Nevada and was the CEO, Chairman of the
 18 Board, and majority shareholder of GRD/SulphCo at all relevant times.
- 19 4. Between 1997 and 2003, Gunnerman served as Chairman of the Board of Directors,
 20 Chief Executive Officer and Chief Scientist at Clean Fuels Technology ("CFT"), a
 21 company founded by Gunnerman to develop cleaner burning fuels. On January 3,
 22 1994, CFT's predecessor-in-interest and Gunnerman entered into an Exclusive License
 23 Agreement ("ELA"), whereby CFT became the exclusive licensee of certain patents and
 24 patent applications invented by Gunnerman.

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 27 ¹ Although the Court has attempted to avoid commingling findings of fact with conclusions of
 28 law, any conclusions that are inadvertently labeled as findings (or vice versa) shall be considered "in
 [their] true light, regardless of the label that the . . . court may have placed on [them]." Tri-Tron
 International v. Veltco, 525 F.2d 432, 435-36 (9th Cir. 1975).

1 5. Section 1.1 of the ELA, as amended, defines the “Field” of technology licensed to CFT
 2 as follows:

3 (a) methods, processes, compositions and apparatuses for
 4 carrying out combustion for the generation of heat in (i) internal
 5 combustion engines, either compression or spark ignited and (ii)
 6 open flame applications such as boilers and combustion turbines;

7 (b) aqueous fuels, including fuels described in the Patents, as well
 8 as (i) methods, processes, apparatuses and compositions for their
 9 production and (ii) methods, processes, compositions and
 10 apparatuses for their combustion; and

11 (c) methods, processes, compositions and apparatuses used for
 12 production of chemicals, petrochemicals, plastics or
 13 pharmaceuticals utilized in connection with any of the above.

14 6. In December of 1998, Gunnerman, his son Peter (an executive at CFT), and Alex Paior
 15 (Vice President of CFT) became aware of and started investigating sulfur removal
 16 technology being researched by an engineering professor by the name of T. G. Yen,
 17 Ph.D (“Yen”). Gunnerman informed the CFT Board of Directors that Yen’s technology
 18 was distinct from the technology being developed by CFT, and that he wished to
 19 independently pursue its development at the newly-formed GRD.²

20 7. On November 28, 2000, Gunnerman and CFT entered into a Separate Corporate
 21 Opportunity Agreement, whereby CFT recognized that Gunnerman was free to develop
 22 Yen’s sulfur removal technology at SulphCo. Specifically, CFT acknowledged that “[a]
 23 primary asset of SulphCo is a technology for the reduction of sulfur in petroleum
 24 products” and that “the development of SulphCo’s technology was separate and apart
 25 from CFT.” The preponderance of the evidence suggests that when the Separate
 26 Corporate Opportunity Agreement was negotiated and entered into, nobody at CFT
 27 viewed Yen’s sulfur removal technology (hereinafter referred to as the SulphCo IP) as
 28 being within the Field of the ELA.

29 8. The Separate Corporate Opportunity Agreement also required Gunnerman to concede

27 2 GRD was founded by Gunnerman in the year 1999 and conducted business under the name
 28 SulphCo. It was later merged into a public company that changed its name to SulphCo, Inc. Thus,
 29 the name “SulphCo” is hereinafter used to refer to either the closely-held corporation GRD, using the
 name SulphCo, or to the public company named SulphCo, Inc.

1 to certain terms regarding his CFT voting rights and corporate governance.
2 Additionally, Gunnerman agreed to step down as the CEO of CFT and become a
3 consultant. The terms of Gunnerman's engagement as a consultant were set forth in
4 a Consulting Agreement dated December 4, 2000. The Consulting Agreement
5 prevented Gunnerman from competing with CFT in any business "within the Field," as
6 defined in the ELA.

- 7 9. In April of 2002, one of the first patents related to the SulphCo IP was issued to Yen
8 and assigned to SulphCo as U.S. Patent No. 6,402,939 (the "Yen Patent"). Thereafter,
9 additional patents related to the SulphCo IP were issued to Gunnerman and assigned
10 to SulphCo.
- 11 10. In early 2003, Capital Strategies agreed to make a substantial investment in CFT,
12 which resulted in three agreements dated April 23, 2003 that significantly affected the
13 relationship between Gunnerman and CFT:
14 a. A Note Purchase Agreement, whereby Capital Strategies acquired Gunnerman's
15 \$20 million in outstanding loans to CFT for a purchase price of \$2.2 million;
16 b. A Technology Transfer and Assignment Agreement ("Transfer Agreement"),
17 whereby Gunnerman transferred and assigned to Capital Strategies all of his
18 "present and future right, title, and interest in and to" certain intellectual property
19 rights related to the Field.
20 c. A Termination and Release Agreement, whereby Gunnerman and CFT agreed
21 to terminate the Consulting Agreement and modify Gunnerman's non-
22 competition obligations. In particular, a provision in the Termination and
23 Release Agreement clarifies that the surviving non-competition provisions of
24 the Consulting Agreement "shall not include the 'SulphCo Field'."
25 11. The term "Field" in the Transfer Agreement has the same meaning as the term
26 contained in the ELA. None of the SulphCo IP is listed in Exhibit 2.1(i) of the Transfer
27 Agreement, which contains a non-exclusive listing of patents and applications
28 transferred by the Agreement. The Transfer Agreement was subsequently amended

1 to clarify that only technology related to the Field was being transferred. The
2 amendments also specified that "all Know-How that relates to aqueous or fuel/oil based
3 emulsions" was being conveyed pursuant to the Transfer Agreement.

- 4 12. None of the SulphCo IP was conveyed to Capital Strategies pursuant to the Transfer
5 Agreement or its subsequent amendments. Furthermore, the weight of the evidence
6 indicates that Gunnerman and Capital Strategies did not intend or believe that the
7 Transfer Agreement, as amended, conveyed the SulphCo IP to Capital Strategies.
8 This finding is supported by the conduct of the parties during and after execution of the
9 Transfer Agreement.
- 10 13. All of Capital Strategies' rights under the Transfer Agreement were assigned to
11 Talisman pursuant to a Technology Transfer Assignment Agreement dated May 26,
12 2005. These rights did not include the SulphCo IP.

13 II. CONCLUSIONS OF LAW

- 14 1. The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1338(a), and venue
15 is proper under 28 U.S.C. § 1400(b).
- 16 2. The burden of proof is upon Plaintiff to establish the elements of its claims. Nissan Fire
17 & Marine Ins. Co., Ltd. v. Fritz Companies, Inc., 210 F.3d 1099, 1107 (9th Cir. 2000);
18 see also Pacific Portland Cement Co. v. Food Mach. & Chem. Corp., 178 F.2d 541, 546
19 (9th Cir. 1949) ("In a declaratory judgment action, the party that has the burden of proof
20 is determined . . . by the nature of the relief sought.").
- 21 3. A plaintiff in a civil action has the burden of proving its case by a preponderance of
22 evidence. See, e.g., Parke v. Raley, 506 U.S. 20, 31 (1992); McKenzie v. McCormick,
23 27 F.3d 1415, 1419 (9th Cir. 1994).
- 24 4. Weighing all of the evidence and assessing the credibility of the witnesses, the Court
25 concludes that the burden of proof has not been carried with regard to the claims
26 asserted in this case.
- 27 5. The Transfer Agreement, as amended, and all other relevant agreements are legal and
28 binding.

- 1 6. Gunnerman did not transfer or assign the SulphCo IP to Capital Strategies pursuant
2 to the Transfer Agreement. It therefore follows that Talisman is not entitled to a
3 declaration that it is the sole and exclusive owner of the SulphCo IP. Because
4 Talisman is not the sole and exclusive owner of the SulphCo IP, Gunnerman did not
5 breach the Transfer Agreement by any use or exercise of ownership, custody or control
6 over the SulphCo IP.
- 7 7. In every contract, there exists an implied covenant of good faith between the parties.
8 Dunlap v. State Farm Fire & Cas. Co., 878 A.2d 434, 442 (Del. 2005). However, in the
9 absence of any breach by Gunnerman of the Transfer Agreement, there is also no
10 breach of any implied duty of good faith and fair dealing. Gunnerman also did not
11 breach his warranty in the Transfer Agreement by assigning the SulphCo IP to
12 SulphCo.
- 13 8. To establish tortious interference with contractual relations in Nevada, the Court must
14 find: (1) a valid and existing contract; (2) the defendant's knowledge of the contract;
15 (3) intentional acts intended or designed to disrupt the contractual relationship; (4)
16 actual disruption of the contract; and (5) resulting damage. J.J. Industries, LLC v.
17 Bennett, 71 P.3d 1264 (Nev. 2003) (citing Sutherland v. Gross, 772 P.2d 1287, 1290
18 (Nev. 1989)). There was insufficient evidence that SulphCo, through Gunnerman,
19 intended or designed to interfere with the provisions of the Transfer Agreement.
20 Additionally, there was no actual disruption of Talisman's rights under the Transfer
21 Agreement. Accordingly, SulphCo did not tortiously interfere with Talisman's rights
22 under the Transfer Agreement by causing or inducing Gunnerman to breach the
23 Transfer Agreement or otherwise interfering with Gunnerman's performance of his
24 contractual obligations to Talisman under the Transfer Agreement.
- 25 9. Under Nevada law, conversion is a "distinct act of dominion wrongfully exerted over
26 another's personal property in denial of, or inconsistent with his title or rights therein."
27 Evans v. Dean Witter Reynolds, Inc., 5 P.3d 1043, 1048 (Nev. 2000). Because
28 Talisman does not have a property interest in the SulphCo IP, Gunnerman and

- 1 SulphCo did not convert the SulphCo IP by exerting dominion over the SulphCo IP.
- 2 10. In Nevada, unjust enrichment occurs when a person has and retains a benefit which
3 in equity and good conscience belongs to another. Mainor v. Nault, 101 P.3d 308, 317
4 (Nev. 2004). SulphCo is not liable to Talisman for unjust enrichment because it did not
5 unjustly retain benefits to the loss of Talisman, or money or property belonging to
6 Talisman.
- 7 11. Defendants are entitled to judgment in their favor and dismissal of all claims with
8 prejudice.

9 **III. CONCLUSION**

10 In accordance with the Findings of Fact and Conclusions of Law stated herein, IT IS
11 HEREBY ORDERED that the Clerk of the Court shall enter judgment in favor of Defendants.

12 DATED: This 14th day of May, 2009.

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15 UNITED STATES DISTRICT JUDGE

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